

1 JOHN S. BATTENFELD, SBN 119513  
email: jbattenfeld@morganlewis.com  
2 ALEXANDER CHEMERS, SBN 263726  
email: achemers@morganlewis.com  
3 MORGAN, LEWIS & BOCKIUS LLP  
300 South Grand Avenue  
4 Twenty-Second Floor  
Los Angeles, CA 90071-3132  
5 Tel. 213.612.2500  
Fax: 213.612.2501

6 MORGAN, LEWIS & BOCKIUS LLP  
7 JENNIFER WHITE-SPERLING, SBN 166504  
email: jwhite-sperling@morganlewis.com  
8 JOHN D. HAYASHI, SBN 211077  
email: jhayashi@morganlewis.com  
9 5 Park Plaza, Suite 1750  
Irvine, CA 92614  
10 Tel: 949.399.7000  
Fax: 949.399.7001

11 MORGAN, LEWIS & BOCKIUS LLP  
12 STEPHANIE A. BLAIR, admitted *pro hac vice*  
email: sblair@morganlewis.com  
13 1701 Market Street  
Philadelphia, PA 19103-2921  
14 Tel: 215.963.5000  
Fax: 215.963.5001

15  
16 Attorneys for Defendant  
LOCKHEED MARTIN CORPORATION

17 UNITED STATES DISTRICT COURT  
18 SOUTHERN DISTRICT OF CALIFORNIA  
19

20 THOMAS RIX, an individual, on behalf of  
21 himself, and on behalf of all persons  
22 similarly situated,

23 Plaintiff,

24 vs.

25 LOCKHEED MARTIN CORPORATION,  
a Maryland Corporation, and Does 1 to 10,

26 Defendants.  
27

Case No. 09-cv-2063-MMA-NLS

**OPPOSITION OF DEFENDANT  
LOCKHEED MARTIN CORPORATION  
TO PLAINTIFF'S MOTION FOR CLASS  
CERTIFICATION**

Assigned To:  
The Honorable Michael M. Anello

Date: February 7, 2011  
Time: 2:30 p.m.  
Room: 5 (3rd Floor)

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1 **I. INTRODUCTION**

2 The evidence in this case – misstated or ignored in Plaintiff Thomas Rix’s Motion for  
 3 Class Certification (“Motion”) – establishes that Rix’s misclassification and other claims are  
 4 entirely inappropriate for class adjudication. Rix’s motion fails to address his actual job duties  
 5 and those of other Industrial Security Representatives and Industrial Security Representative Srs.  
 6 (“ISRs”). Instead, Rix bases his Motion on a fictional job that neither he nor any other ISR had,  
 7 in a wrongly merits-based attempt to argue authority involving “public safety officers.” Rix’s  
 8 own evidence does not support his theory that all ISRs are primarily tasked with “investigating,  
 9 preventing, and detecting breaches of security protocols and procedures.”

10 In addition, Rix cannot establish the relevant factors identified by the Ninth Circuit for  
 11 certification of misclassification claims. *See In re Wells Fargo Home Mortgage Overtime Pay*  
 12 *Litig.*, 571 F.3d 953 (9th Cir. 2009) (“*Wells Fargo*”); *Vinole v. Countrywide Home Loans, Inc.*,  
 13 571 F.3d 935 (9th Cir. 2009) (“*Vinole*”). Rix has no evidence of comprehensive uniform policies  
 14 or training detailing the duties of all ISRs, and no other common proof that would absolve the  
 15 court from inquiring into how each ISR spent their working day.

16 To the contrary, the evidence, including Rix’s own deposition testimony, establishes that  
 17 the duties of the alleged class are far from uniform. Therefore, individual inquiries would be  
 18 required to determine each ISR’s exempt status. For these reasons, Rix’s motion should be  
 19 denied.

20 **II. FACTUAL BACKGROUND**

21 **A. Lockheed Martin**

22 Lockheed Martin (“LM”) is a global company that is principally engaged in the research,  
 23 design, development, manufacture, integration and sustainment of advanced technology systems,  
 24 products, and services. DKT 24 FAC, ¶ 1. LM’s work for various federal defense agencies can  
 25 involve access to secret and other classified information that must be safeguarded in the interests  
 26 of national security.

27 To access classified information, LM must obtain a Facility Clearance Level (“FCL”)  
 28 through the Defense Security Service (“DSS”) for the relevant facility. Ex 7G (Shobert 47:12-

48:7; 91:3-24).<sup>1</sup> A FCL may be granted at the Secret or Top Secret level. *Id.* LM must sign a DD-441 agreement, which obligates it to comply with the security requirements of the National Industrial Security Program Operating Manual (“NISPOM”). *Id.* Once a facility is cleared, the DSS works with it to ensure the protection of classified information released or created. *Id.*

The NISPOM has only the minimal guidelines for safeguarding classified material. *Id.* at 47:12-48:7, 52:4-7. The NISPOM covers only collateral (unclassified and secret) programs. *Id.* at 57:10-14. The Joint Air Force-Army-Navy (“JAFAN”) manuals, which superseded the NISPOM Sup., provide guidance for Special Access Programs (“SAPs”). SAPs are highly sensitive programs that have need-to-know and access controls beyond those normally provided for access to confidential, secret, or top secret information. *Id.* at 50:12-51:24, 55:20-56:13. NISPOM and JAFAN are just the guides that set forth the security criteria, but how that criteria is interpreted and applied depends upon the program and the customer needs. Ex 7A (Aviles 67:12-19). These guides do not specify how the classified information is to be safeguarded. Instead, an ISR prepares a plan based on his/her assessment of the factors, including the customer’s needs, and presents that plan to the customer for approval. *Id.* 68:21-69:25). Further, each program can be subject to program specific security requirements set forth in the contract between LM and the DOD or the agency, which an ISR must interpret and implement. *See, e.g.*, Ex 7G (Shobert 78:22-81:1 (each program has different rules and regulations as to how documents are handled) 102:23-104:20 (ISRs take the Security Classification Guide, statement of work, and program specific classification and security directives to generate own procedures)); Ex 7A (Aviles 89:7-92:1 (ISRs provide criteria based on customer goals for program access for non-exempt employees to implement)).

### **B. The Evidence Shows That ISR Duties Are Far From Uniform**

Within this contractor/DOD-agency framework, the overall role of an ISR is to ensure the protection of classified information that is entrusted to LM. However, within that broad function, as discussed below, the duties of the ISRs at issue here are diverse, depending upon each ISR’s

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<sup>1</sup> All references to “Ex” refers to LM Appendix of Evidence. The references to “Dep. Ex.” refer to deposition exhibits, also included in the Appendix of Evidence.



1 specific assignment, the classification, size, type and phase of the program they are supporting,  
2 the skills and experience of the ISR, and other factors.

3 An ISR can be assigned to provide matrix or program support. The matrix support ISRs  
4 are not assigned to support a specific program, but rather perform duties that support a myriad of  
5 programs. Ex 7G (Shobert 18:18-19:18). A matrix support ISR can work in Communications  
6 Security, Technical Security (which includes physical security and computer security),  
7 Investigations Unit, Government Security (which includes Security Education and Training  
8 (“SEAT”), PAR processing, and clearance processes), or Security Services (which includes alarm  
9 administration, badge and id, visit control and classified material destruction services). *Id.* at  
10 142:1-143:9; 179:19-189:17, 189:25-192:18; Ex 7A (Aviles 26:13-19), Ex 2 (Barragan Decl. ¶ 3).

11 ISRs assigned to matrix support are often specialists with distinct job duties. Ex 7G  
12 (Shobert 133:2-134:2 (matrixed COMSEC ISRs highly trained by NASA with specialized  
13 experience in encryption)); 205:8-20 (matrixed computer security ISR more likely to be paid  
14 more because requires certain technical skills). For example, at Palmdale, one matrix support ISR  
15 primarily supervises several hourly locksmiths and the Linnell system operator in the lockshop.  
16 *Id.* 181:17-183:11. Matrixed ISRs at Palmdale assigned to computer security perform duties such  
17 as developing Specialized Security Policies governing computer uploads/downloads, developing  
18 guidelines for access to computer equipment, performing threat testing to monitor the security of  
19 the network, and testing the computer’s firewalls and security programs, preparing threat  
20 assessments and vulnerability reports, and making recommendations on how to maintain network  
21 security. Ex 1 (Albin Decl. ¶ 4). Another matrixed ISR who worked with physical security had  
22 duties including designing and planning physical workspaces where engineers can work on  
23 classified projects. Ex 4 (Riggs Decl. ¶¶ 5-7) (worked with subcontractor to design a cost-  
24 effective solution to adapt the facility in an older building to meet security protocols to be  
25 certified)). Another matrixed ISR assigned to physical security had different duties, including  
26 inspecting classified workspaces to verify their manual compliance with security protocols,  
27 supervising contractors who performed the manual work to remedy any potential physical  
28 security issues (such as patching holes in walls, repairing conduit lines, fixing malfunctioning

locks, planning security alarm coverage for classified workspaces, and preparing security accreditation paperwork. Ex 2 (Barragan Decl. ¶ 6). Another matrixed ISR's duties focused on personal security issues, including addressing issues relating to eligibility for a DOD clearance to access a Special Access Required ("SAR") program, and tracking and reporting on employee foreign travel, foreign contact, foreign money, and unexplained wealth. Ex 7G (Shobert 157:1-159:14).

The duties of the ISRs assigned to specific programs also vary depending upon the programs to which they are assigned. In SAPs, ISRs can be Contractor Program Service Officers ("CPSO"), an assigned, billeted position with the government, for one large program or a series of interconnected programs. *Id.* Shobert 100:3-113:11. At Palmdale, CPSOs are assigned to Advanced Development Programs ("ADP"), commonly known as Skunkworks, with duties such as identifying and setting up the facility, identifying the proper staffing for the program, developing area operating procedures, job instructions and security operations procedures for the program, identifying the need for and requesting deviations or a permanent waiver from JAFAN requirements, having signature authority for all Program Access Requests ("PARs") and official correspondence from the program, creating all TS-move plans for classified hardware assets, creating test plans, having overall responsibility for all courier activity (including formulating detailed courier plans in concert with the TSA and FBI), and being the primary point of contact with the government. *Id.* Depending upon the program, the CPSO can also work closely with subcontractors, including assisting the subcontractor to obtain accreditation of its facility and then becoming responsible for the security of that facility. *Id.* at 163:19-166:6. Further:

[CPSOs] are in a decision-making capability all day long. And, again, their roles change just like every day. There is absolutely nothing routine about what a CPSO does, with the exception of showing up for work.

*Id.* at 107:21-25.

Another ISR acts as the sole security site lead for the U-2 program. His responsibilities include conducting security briefings with the customer, tracking security incidents, providing weekly status updates to program managers, advising the customer on applicable security guidelines, approving PARs, and providing HIRSCH security access for personnel working in the

1 program area. He serves as both a point of contact and as a supervisor for the Plant Protection  
2 Officers in his building, who often come to him with security-related questions. Ex 5 (Stephens  
3 Decl. ¶ 5).

4 Other ISRs support large programs, like the F-117 program that developed the “stealth  
5 fighter.” In large programs, ten to fifteen ISRs all with different roles can be assigned to a team.  
6 Ex 2 (Barragan Decl. ¶ 4). For example, an ISR may be assigned to visitor control or Information  
7 Management Control (“IMS”) functions within a large program. In addition, an ISR’s duties can  
8 vary depending upon whether the large program is hardware- or document-centric or an  
9 unacknowledged or acknowledged SAP, or collateral program. *Id.* For example, each program  
10 has its own set of rules and regulations as to how the classified documents are to be handled,  
11 transmitted and destroyed. Since the rules and regulations governing unacknowledged programs  
12 cannot be disclosed, what activities an ISR performed cannot even be described. *See, e.g.*, Ex 7A  
13 (Aviles 76:14-77:1). For a document-centric program, which handles highly classified  
14 documents, an ISR’s duties may include determining whether documents are properly classified  
15 and have the proper classification and declassification and downgrading authority, writing  
16 discrepancy reports, cataloguing and tracking documents, controlling the distribution of  
17 documents to approved recipients, completing data file transfers and technology transfer requests,  
18 creating courier plans, ensuring the proper destruction of documents, including as appropriate  
19 preparing TS-move plans which sometimes include armed guards, conducting secure postal runs  
20 of classified documents, and other tasks. *Id.* In a hardware-centric program, an ISR’s expertise is  
21 applied to security issues concerning hardware. Ex 7G (Shobert 70:17-21). This includes  
22 advising program engineers at what point in the conception or building of a part it becomes  
23 classified. *Id.* at 155:8-21

24 The amount and nature of the discretion each ISR exercises also depends on various  
25 factors, including their assignments, their level of clearance, the particular job duties they  
26 performed, the experience and skills they had, the programs in which they worked, and the  
27 managers they had. For example, Plaintiff claimed that he was closely supervised by two of his  
28 managers. Ex 7C (Rix 239:19-240:19). In contrast, other ISRs worked with little or no

supervision. Ex 5 (Stephens Decl. ¶ 5 (security site lead for the U-2 program)); Ex 1 (Albin Decl. ¶ 6 (relies on ISRs to take initiative and encourages them to come up with ideas and recommendations)); Ex 3 (Nye Decl. ¶ 4 (expects the four ISRs he supervises at Edwards AFB to work independently and without direct supervision)). Rix claims that he never developed security programs or procedures for classified materials standard operating procedures (“SOP”) or practices and policies (“SPP”) (Ex 7C (Rix 82:2-16), but other ISRs have. Ex 3 (Nye Decl. ¶ 5 (ISRs meet with government representatives and analyze, interpret and apply guidelines such as NISPOM and JAFAN to create procedures and protocols specific to the customer’s program needs)); Ex 1 (Albin Decl. ¶ 5 (ISRs interpret NISPOM and JAFAN and develop customized procedures and systems that are applicable to the supported programs)). ISRs also made recommendations as to various issues specific to their role. Ex 2 (Barragan Decl. ¶ 8 (recommended deviation proposal to address storage of classified material in an emergency and a cost-saving recommendation regarding option to provide secure space); Ex 5 (Stephens Decl. ¶ 6 (recommended creation of electronic visitor database for use of Plant Protection Officers)).

**C. The Work Experience of Rix Demonstrates The Variability In Duties Performed By Of A Particular ISR**

When Rix came to Palmdale in 2004, he was assigned to the U-2 program.<sup>2</sup> Rix’s first supervisor gave him autonomy in completing his assignments. Ex. 7E (Rix 556:16-557:22). Rix was not able to discuss all of his U-2 program duties because of classified information, but he wrote a concept of operation for the site, and conducted security briefings and debriefings, including tailored group and one-on-one briefings, where he provided advice about security issues. *Id.* at 142:11-144:13, 148:24-151:23, 155:12-156:1.

In 2005, Rix began working on the F-117 program in Special Missions. Ex. 7C (Rix 77:7-10). Unlike the U-2 program, F-117 was a SAP. *Id.* 80:6-14. Rix then rotated into different functions in Special Missions. *Id.* at 179:17-180:8.

For nine months in 2006-2007, Rix worked in the Classified Material Services (“CMS” or

<sup>2</sup> Rix spent six years in the U.S. Army; and described his experience as including: “Tactical and strategic service domestic and abroad. Experience with various intelligence agencies.” Ex 7C, E, F (Rix 45:6-46:5, 486:8-19, Dep. Ex 31).

1 “document control”) area where his primary duties were CMS functions. Rix felt these functions  
2 were “mundane and routine.” 26.9. *Id.* at 173:3-6, 277:3-11. Before that assignment, he had  
3 spent at most 5 minutes a week performing CMS functions. *Id.* at 177:25-178:13.

4 In April 2007, Rix was transferred to the 227 area, where he performed different duties.  
5 *Id.* 308:21-24; 313:19-22. *See* Ex 11 311:25-313:11 (partial list of duties allegedly performed in  
6 CMS vs. 227 prepared by Rix). Rix referred to himself as the “lead counterintelligence  
7 representative,” and he created and delivered a counterintelligence (“CI”) briefing, created a 20-  
8 25 page program security representative handbook, created a foreign travel book, among other  
9 duties. *Id.* at 159:20-25, 191:2-23, 329:10-15, 321:21-322:8, 365:3-366:3. Plaintiff processed  
10 only 20 PARs during his entire employment at Palmdale. *Id.* 377:14-24.

11 In 2008, Rix took on a different function, focusing on the closeout phase of the F-117  
12 program, which involved decertifying areas, creating a presentation on the closeout process for  
13 management, analyzing statistics and lessons learned for upcoming program closures, and  
14 developing processes to save time in decertifying areas. *Id.* 389:19-21; 392:11-20; 398:18-  
15 403:16. Prior to 2008, Rix performed minimal decertification duties. *Id.* 392:21-393:9. During  
16 2008, Rix continued with program security education training and awareness programs and  
17 briefings, public release issues, and updating the CI brief; he also created, developed and  
18 delivered a weekly update on CI issues, created a national threat book, and created the “CI edge  
19 cookbook.” *Id.* 419:25-422:8. In 2008 and continuing into 2009, Rix also was involved in  
20 recruitment duties. *Id.* 403:21-409:9.

21 While assigned to Special Missions, Bea Aviles and Mark Muranaga were Rix’s  
22 supervisors. Rix claimed that Aviles and Muranaga “stand over you watching you every step of  
23 the way to see if you were doing it properly or to their satisfaction.” *Id.* 556:24-557:12. In 2006,  
24 Rix thought that Aviles and Muranaga were spying on him, and claimed Aviles, Muranga, and  
25 others were part of “an absolutely corrupt security organization which operates on nepotism.” Ex  
26 7C (Rix Dep. Ex 8, 237:1-9, 239:23-240:19, 245:18-247:1).

27 In 2009, with the closure of the F-117 program, Rix was transferred to the Computer  
28 Security department. His supervisor there was Karen Barragan, who Rix stated “was less of a

1 micro-manager than Aviles. Ex. 7E (Rix 556:16-557:15; 501:2-18). Because Rix lacked  
 2 technical expertise, he was assigned inventory and backup duties. However, he identified a  
 3 security flaw and created a system to streamline the inventory process. Ex. 7E, F (Rix 492:7-  
 4 494:25, 497:14-21, Dep. Ex. 33, 499:16-501:1). From July 6, 2009 to his termination in August  
 5 of 2009, Rix assisted investigators because they were short on personnel; until that time he did  
 6 not have an investigator job function. Ex. 7C (Rix 73-74).

7 Rix had significant performance-related issues, receiving a “Basic Contributor” rating on  
 8 his annual performance reviews in 2006, 2007, and 2008. *Id.* 223:23-25; 341:3-12; Ex 15; 382:7-  
 9 12. According to Rix, “Basic Contributor” means someone who is “very unknowledgeable,  
 10 nonperforming, incompetent, [and] ‘needs to be held by the hand to do his or her job type[.]’” *Id.*  
 11 223:23-224:21. Rix was on a performance development plan in 2007 and 2008. Ex. 7E (Rix  
 12 497:19-498:8). Among other issues, Rix did not have an adequate understanding of complex  
 13 federal security procedures, including SAP/SAR, and he regularly disappeared during work  
 14 hours. Ex. 7C (Rix 220:24-221:19; 295:25-297:6); Ex 7A (Aviles 139:5-25, Dep. Ex. 15).

15 In 2009, Rix engaged in egregious misconduct and was terminated. On July 23, 2009, Rix  
 16 climbed over the security fence at the Palmdale facility – a major violation of security procedures.  
 17 At the same time, various females complained of sexual harassment by Rix who made frequent  
 18 inappropriate remarks.<sup>3</sup> Following an investigation, Rix was terminated on August 21, 2009.

### 19 **III. THE REQUIREMENTS FOR CLASS CERTIFICATION ARE DEMANDING**

20 Rix bears the heavy burden of establishing that the proposed class meets all the Rule 23(a)  
 21 requirements and at least one Rule 23(b) requirement. *Zinser v. Accufix Research Inst., Inc.*, 253  
 22 F.3d 1180, 1186 (9th Cir. 2001). The Court must “perform a rigorous analysis to ensure that the  
 23 prerequisites of Rule 23 have been satisfied.” *Dukes v. Wal-Mart Stores, Inc.*, 2010 WL  
 24 1644259, \*16 (9th Cir. 2010), cert. granted, \_\_\_ U.S. \_\_\_ (2010). Rix must actually demonstrate,  
 25 not just allege, that his suit is appropriate for class resolution. *Id.* at \*13. “Whether judicial

26 <sup>3</sup> For example: (1) Rix stated to one female, “Would you give me a blow job?”; (2) at recruiting events, Rix gave  
 27 female applicants his personal contact information and sent them emails like, “Yoga huh? You’re a hottie and  
 28 flexible—wow! When are we going out? Haha;” (3) Rix told a co-worker, “If I said I’d like to/want to kiss you,  
 you’d be cool with that, right? You wouldn’t make a big deal about it/get me in trouble/turn me in, right?” Ex 7E, F  
 (Rix 541:16-544:17, Dep. Ex. 41).



economy will be served in a particular case turns on close scrutiny of ‘the relationship between the common and individual issues.’” *Wells Fargo*, 571 F.3d at 958 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)).

**IV. RIX’S CLAIMS ARE NOT TYPICAL AND HE IS NOT AN ADEQUATE CLASS REPRESENTATIVE**

Rix may sue as a representative party on behalf of a class only if his claims or defenses are typical of the claims or defenses of that class. Fed.R.Civ.P. 23(a)(3). Typicality is lacking if Rix is subject to unique defenses that threaten to become the focus of the litigation. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992). Rix must also show that he will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a)(4). A plaintiff subject to unique defenses is an inadequate class representative. *Kassover v. Computer Depot, Inc.*, 691 F.Supp. 1205, 1215 (D. Minn. 1987). Here, given Rix’s substandard performance and termination for egregious violations of company policies, Rix is subject to unique defenses demonstrating lack of typicality and inadequacy. *Drake v. Morgan Stanley & Co., Inc.*, 2010 WL 4054123, \*4-5 (C.D. Cal. Apr. 30, 2010) (finding that employee subject to unique defenses relating to substance abuse and inadequate performance was neither typical nor an adequate representative).

**V. RIX CANNOT MEET THE PREDOMINANCE REQUIREMENT OF RULE 23(B)(3)**

**A. A Misclassification Class Should Not Be Certified If the Claims Require A Fact-Intensive, Individual Analysis Of Each Employee’s Exempt Status**

Rule 23(b)(3) permits a class action only if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members . . .” The predominance inquiry tests whether the class is sufficiently cohesive to warrant adjudication by “representation.” *Wells Fargo*, 571 F.3d at 957. “[P]laintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof.” *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001).

1 “Rule 23(b)(3) requires a district court to formulate ‘some prediction as to how specific  
2 issues will play out in order to determine whether common or individual issues predominate in a  
3 given case.’” *Dukes*, 2010 WL 1644259 at \*16. For misclassification claims, an assessment of  
4 Rule 23(b)(3) “implicates the analytical framework within which courts review application of the  
5 exemption to an employee.” *Vinole*, 571 F.3d at 944. Certification is not appropriate if the court  
6 determines that “Plaintiffs’ claims require a fact-intensive, individual analysis of each employee’s  
7 exempt status.” *Id.* at 947.

8 **B. Individual Issues Would Predominate In The Determination Of An ISR’s**  
9 **Exempt Status Under The Administrative Exemption**

10 Under California law, the administrative exemption requires an inquiry into whether: (1)  
11 the employee’s duties and responsibilities involve the performance of office or non-manual work  
12 directly related to management policies or general business operations of the employer or the  
13 employer’s customers; *and* (2) the employee customarily and regularly exercises discretion and  
14 independent judgment; *and* (3) the employee regularly and directly assists an exempt executive or  
15 administrative employee, *or* the employee performs under only general supervision work along  
16 specialized or technical lines requiring special training, experience, or knowledge, *or* the  
17 employee executes under only general supervision special assignments and tasks; *and* (4) the  
18 employee spends more than half the time engaged in duties that meet the test of the exemption, as  
19 such terms are construed under the FLSA. Wage Order 4-2001 (“WO”) § 1(B)(2); Cal. Labor  
20 Code § 515(e). Work that meets the test of the exemption includes “all work that is directly and  
21 closely related to exempt work and work which is properly viewed as a means for carrying out  
22 exempt functions.” WO § 1(B)(2)(f).

23 Under the governing regulations, if an employee performs “office” work “it is immaterial  
24 whether it is manual or non-manual in nature.” Even if the employee does not perform office  
25 work, the performance “of some manual work will not preclude exempt status, unless “the  
26 employee performs so much manual work (other than office work) that he cannot be said to be  
27 basically a ‘white-collar’ employee . . . .” *See* former 29 C.F.R. § 541.203(a) and (b).<sup>4</sup>

28 <sup>4</sup> The California Wage Order expressly incorporates this and other specified federal regulations in effect as of 2001.



1 The phrase directly related to management policies or general business operations is  
 2 meant to describe activities of substantial importance to the management or operation of the  
 3 employer's business or its customers (here the U.S. government). 29 C.F.R. § 541.205(a). This  
 4 is not limited to persons who directly participate in the formulation of management policies or in  
 5 the operation of the business as a whole. Rather, employees whose "work affects policy or whose  
 6 responsibility it is to execute or carry it out" are also covered by the administrative exemption.  
 7 The exemption can also apply to employees whose assignments "are tasks related to the operation  
 8 of a particular segment of the business, and to "advisory specialists". 29 C.F.R. § 541.205(c).

9 1. *The Broad Functions Rix Alleges Are Not Susceptible To Common Proof.*

10 Because there is no evidence that an ISR's job duties "are largely defined by  
 11 comprehensive corporate policies and procedures"<sup>5</sup>, Rix attempts to tie ISRs together by claiming  
 12 that they "all spent their time performing the same primary task of investigating, detecting and  
 13 preventing violations of security protocols and procedures."<sup>6</sup> Mtn at 2. This claimed "same  
 14 primary task" (which is actually three broad functions) is not supported by the evidence submitted  
 15 by Rix, bears no resemblance to the ISR job descriptions, and is contradicted by LM's declarants  
 16 and Rix's own testimony.

17 a. Rix's "Primary Task" Assertion Is Not Supported By His Own  
 18 Evidence

19 In three cookie-cutter declarations submitted by Rix, three former ISRs (who ended their  
 20 employment in January 2006, March 2007 and July 2008) stated that they spent over 50% of their  
 21 time "(a) receiving, storing, marking, transmitting, and transporting documents; (b)  
 22 opening/closing/locking doors, and/or safes; and (c) briefing and debriefing [LM] employees  
 23 about security protocols." Plfs' Declarants Ellis-Buckner, Weston and Lewis. Not one declarant  
 24 claims their primary duty, or any duty, was "detecting and preventing violations of security  
 25 protocols and procedures." Only one declarant even mentions investigations, but does not  
 26 identify it as a primary task. Plf's Declarants Lewis ¶ 8. These declarations clearly do not

27 <sup>5</sup> *Vinole*, 517 F.3d at 946 (citing *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152 (S.D.N.Y. 2008)).

28 <sup>6</sup> While Plaintiff contends that the "evidence" described in his brief confirms the duties alleged in his FAC (Mtn. 5),  
 the FAC did not allege that the primary duties of ISRs were "investigating, detecting and preventing violations of  
 security." See FAC ¶ 3.

1 support Rix's "primary task" theory.

2 Rix's own deposition testimony also does not support his "primary task" theory. Rix  
3 testified that he did not have an investigator's title or function while employed at Palmdale.<sup>7</sup> Ex  
4 7C (Rix 73:24-74:15.) Rix did not testify that his primary duty was "detecting and preventing  
5 breaches of security protocols and procedures." Instead, Rix described the wide variety of duties  
6 he performed during his employment, that changed over time. *See*, discussion section II.C.  
7 above.<sup>8</sup>

8 Contrary to Rix's contention, the job descriptions do not "show" that ISRs are primarily  
9 tasked with "investigating, detecting and preventing breaches of security protocols and  
10 procedures." Mtn 10. Both job descriptions include the following descriptor:

11 Develops, and administers security programs and procedures for classified  
12 or propriety materials, documents, and equipment. Studies and implements  
13 federal security regulations that apply to company operations. Obtains  
14 rulings, interpretations, and acceptable deviations for compliance with  
15 regulations from government agencies. Prepares manuals outlining  
16 regulations, and establishes procedures for handling, storing, and keeping  
17 records, and for granting personnel and visitors access to restricted records  
18 and materials. Conducts security education classes. Investigates security  
19 violations and prepares reports specifying preventive action to be taken.

20 DKT 42-5, Plf.'s Ex 10, p. 180. "Investigating" is the only "primary task" claimed by Rix that is  
21 mentioned in the job descriptions and that function is expansively described as "[i]nvestigates  
22 security violations and prepares reports specifying preventative actions to be taken." The job  
23 descriptions also make no mention of the alleged primary duties described by Rix's declarants.  
24 The only overlap is arguably conducting security education classes, if that is what the declarants  
25 mean by "briefing and debriefing Lockheed employees about security protocols." Rix *denied* that  
26 he performed a number of the duties identified on the job descriptions. Ex 7C (Rix 82:8-16, 88:6-  
27 25, 295:4-13). Thus, there is no commonality between Rix's "primary duty" theory, the

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28 <sup>7</sup> Noticeably absent from Plaintiff's motion is a description of the duties he performed as an ISR. Instead Plaintiff  
cites his conclusory testimony that he performed the same work as all ISRs. Mtn 9-10. But Rix admitted that he only  
observed the work of ISRs in the F-117 and U-2 programs. Ex 7C, E (Rix 200:10-201:4; 552:9-25 (testifying that he  
did not know what ISR did in COMSEC because he was not briefed to that program)).

<sup>8</sup> To the extent that Rix claims that all these different duties constitute "preventing breaches of security protocols and  
procedures," that interpretation would render the "task" so broad that it could encompass any job duty performed by  
an employee working in a classified environment, and would therefore not shed any light on what duties someone  
actually performed.

1 declarants' claimed primary tasks, Rix's own testimony about his specific duties, and the duties  
 2 described in the job descriptions. Rix's own evidence demonstrates that it would be necessary to  
 3 conduct an individual inquiry to determine what duties a particular ISR did or did not perform.

4 The source of Rix's "primary task" theory is the so-called "Expert Report" by a plaintiff-  
 5 side attorney, Miles Locker. The Locker Report is inadmissible as a matter of law, as explained  
 6 in LM's concurrently filed Motion to Strike. Moreover, Locker's legal opinion is completely  
 7 unreliable because Locker blatantly misstates or ignores evidence and law. For example, citing  
 8 Rix's deposition, Locker claims that ISRs did not develop or assist in developing security  
 9 programs, policies, or procedures. Locker Report 7. This ignores substantial deposition  
 10 testimony to the contrary including testimony by Rix himself. Ex 7C, E (Rix 291:8-15; 294:4-11,  
 11 389:19-21; 392:11-20; Ex 7G (Shobert 78:22-81:1; 102:23-104:20).

12 b. Rix's Reliance On An Alleged Common Function Does Not  
 13 Demonstrate That ISRs Perform The Same Duties.

14 Even if Rix's evidence supported his contention that ISRs "uniformly perform the same  
 15 task of investigating, detecting and preventing threats to sensitive and classified information," this  
 16 vague common function sheds no light on whether any particular ISR's duties qualify for the  
 17 administrative exemption. California law mandates that, in determining exempt status, "the work  
 18 actually performed by the employee during the course of the workweek must, first and foremost,  
 19 be examined and the amount of time the employee spends on such work . . . shall be considered."  
 20 WO §(1)(A)(1). Rix has no evidence of a policy that establishes what tasks an ISR should do  
 21 each day or how much time should be spent on each task. Further, despite Rix's attempt to  
 22 cherry-pick certain specific duties performed by specific ISRs, the evidence establishes that the  
 23 duties are highly variable not only among ISRs, but as to a particular ISR at particular time.  
 24 Rix's own job history emphatically demonstrates this point as his duties changed markedly over  
 25 time. Rix's cursory duties discussion omits a variety of duties performed by some ISRs,  
 26 including Rix himself. For example, Rix fails to include vendor and subcontractor facility  
 27 security management; developing area and security operating procedures, preparing threat  
 28 assessments and vulnerability reports; making recommendations on how to maintain network

1 security; designing and planning physical workspaces; creating all TS-move plans, including  
 2 coordinating with the TSSA and FBI, being the primary point of contact with the military or  
 3 government agency, and many other duties an ISR may have performed.

4 The need for an individualized inquiry to determine exempt status in this case is  
 5 demonstrated by the applicable regulations. The phrase “exercise of discretion and independent  
 6 judgment” is defined as generally involving

7 the comparison and evaluation of possible courses of conduct and acting while  
 8 making a decision after the various possibilities have been considered. The term  
 9 ... implies that the person has the authority or power to make an independent  
 choice, free from immediate direction or supervision, and with respect to matters  
 of significance.

10 29 C.F.R. § 541.207(a). “The requirement that discretion be exercised with respect to ‘matters of  
 11 significance’ means the decision being made must be relevant to something consequential and not  
 12 merely trivial.” *Taylor v. United Parcel Serv.*, \_\_ Cal. App. 4th at \_\_, 2010 WL 4983586, \*16  
 13 (Dec. 9, 2010). Further, “decisions made as a result of the exercise discretion and independent  
 14 judgment may consist of recommendations for action rather than the actual taking of action.” *See*  
 15 29 C.F.R. § 541.207(e). Given these standards, courts have held that reliance on broad functions  
 16 or overall policies is not a sufficient basis to certify a misclassification class. *See Andrade v.*  
 17 *Aerotek, Inc.*, 2009 WL 2757099 (D. Md. Aug. 26, 2009) (certification under FLSA rejected  
 18 where plaintiffs relied on similar overall functions of recruiters but there was “a wide variety ...  
 19 from recruiter to recruiter, in the specific functions they perform and the degree of frequency with  
 20 which they perform them”).<sup>9</sup> Here, Rix’s alleged common functions shed no light on what duties  
 21 an ISR actually performed, how he was supervised, or the significance of any decisions or  
 22 recommendations made.

23 c. Reliance On Arguments Concerning “Public Safety Officers” And  
 24 “Investigators” Is Not Supported By The Evidence Or The Law.

25 Rix asserts that a class of ISRs should be certified because he contends that ISRs are

26 <sup>9</sup> *See also Weigle v. Fedex Ground Package Sys., Inc.*, 2010 WL 1337031 (S.D. Cal. Apr. 15, 2010) (class  
 27 decertified because even though there were “standard work processes for tasks,” the “common processes are similar,  
 speaking to the small details of particular tasks but not how managers were to balance their responsibilities”); *Keller*  
*v. Tuesday Morning, Inc.* 179 Cal. App. 4th 1389, 1396 (2009) (class decertified where court “observed that the  
 28 question of mandated management policies was subject to class-wide proof, yet the amount of time a manager spent  
 performing these acts and his or her exercise of discretion are matters of individual inquiry”).

1 “public safety employees” as described in 29 C.F.R. § 541.3(b)(1) and that all work performed by  
 2 ISRs is nonexempt work based on this regulation and DOL Letter FLSA 2005-21. Mtn. 6, 7. But  
 3 Section 541.3(b)(1) and the DOL letter do not apply. First, 541.3(b)(1) did not exist in 2001, and  
 4 is not incorporated into the relevant California regulation. *See* WO § 1(A)(2)(f). In any event,  
 5 541.3(b)(1) applies to specified public safety positions, which are expressly listed in the  
 6 regulation. ISRs are private employees who do not have any of the job titles or duties listed in the  
 7 regulation.<sup>10</sup>

8 Likewise, the DOL Letter is inapplicable. The employees at issue were investigators who  
 9 worked for a company that contracted with the DSS solely to provide background investigations  
 10 to DSS of potential government employees considered for secret and top secret security  
 11 clearances. Further, the activities performed by these investigators were “more related to  
 12 providing the ongoing, day-to-day investigative services, rather than performing administrative  
 13 functions directly related to managing” the business, because “the primary duty of the  
 14 Investigator is diligent and accurate fact-finding, according DSS guidelines, the results of which  
 15 are turned over to DSS who then makes a decision as to whether to grant or deny security  
 16 clearances.” There is no evidence that this was the primary duty of Rix, or any ISR, much less all  
 17 of them. For the same reason, the DOL’s view that DSS investigators did not exercise discretion  
 18 and independent judgment is irrelevant to this case.

19 To the extent Rix is attempting to argue that ISRs are “production” workers who  
 20 “produce” investigations, there is no evidence that this is any ISR’s primary duty. Rix himself  
 21 conceded that he only performed investigations during the last two months of his employment. In  
 22 any event, as Rix’s own complaint alleges, LM’s business is not producing investigations; it is  
 23 “principally engaged in the research, design, development, manufacture, integration and  
 24

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25 <sup>10</sup> Among other things, ISRs do not carry guns, do not engage in providing personal security, do not conduct  
 26 surveillance and stakeouts, do not pursue and restrain suspects, and are not first-responders to security incidents. Ex.  
 27 1C Albin Decl. ¶ 4); Ex 4 (Riggs Decl. ¶ 4). The plant protection officers (who are classified as non-exempt)  
 28 perform the day to day work of physically protecting the Palmdale facility, by working at the guard gate, patrolling  
 the facility, responding to alarms, and escorting visitors around the site. Ex. 4 (Riggs Decl. ¶ 4). Indeed, some ISRs  
 supervise plant protection officers. Ex 5 (Stephens Decl. ¶ 5).

1 sustainment of advanced technology systems, products and services.” FAC ¶ 1.<sup>11</sup>

2 Rix’s improper merits argument also cites *Roney v. United States*, 790 F. Supp. 23  
 3 (D.D.C. 1992), *Statham v. United States*, 2002 U.S. Claims LEXIS 264 (Fed. Cl. Sept. 11, 2002),  
 4 *Adams v. United States*, 78 Fed. Cl. 536 (Fed. Cl. 2007), and *Adam v. United States*, 26 Cl. Ct.  
 5 782 (Cl. Ct. 1992), to argue that an ISR’s work “amounts to nothing more than the use of skill in  
 6 applying well-established techniques, procedures or specific standards described in manuals or  
 7 other sources.” As with the other authority cited by Rix, the jobs at issue in these cases have no  
 8 similarity to the ISR position. In addition, these cases do not discuss the standard of “the use of  
 9 skill in applying well-established techniques, procedures or specific standards,” but rather address  
 10 whether the employee provided administrative services to the employer. In *Roney*, the Deputy  
 11 U.S. Marshall did not work in an office, handled potentially dangerous and physically stressful  
 12 situations, performed significant manual work, and did not give advice. 790 F. Supp. at 27. In  
 13 *Statham*, the physical security specialist spent between 70 and 99 percent of his work time  
 14 performing physical executive protection for the Secretary of Energy. Other duties, such as  
 15 identifying threats, planning advance travel work and making recommendations based on advance  
 16 work, were a small part of his time. 2002 U.S. Claims LEXIS at 264. In *Adams*, the HUD  
 17 investigators spent most of their time investigating or leading investigations into crimes of fraud  
 18 upon HUD programs, “typical law enforcement duties”. In *Adam*, the senior border patrol agents  
 19 were uniformed and armed and engaged in routine law enforcement duties concerning  
 20 compliance with immigration laws. 26 Cl.Ct. at 785.

21 In contrast to Rix’s improper merits-based arguments involving clearly inapposite  
 22 positions, the cases that involve analogous positions demonstrate that where employees involved  
 23 with security-related duties are serving in an advisory capacity and exercising discretion and

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24 <sup>11</sup> *Reich v. State of New York*, 3 F.3d 581 (2d Cir. 1993) is also inapposite. In *Reich*, the court also applied the  
 25 administration/production dichotomy in holding that because “the primary function of the Investigators [for the  
 26 Bureau of Criminal Investigations] . . . is to conduct – or ‘produce’ -- its criminal investigations,” the very service  
 27 performed by the Bureau, the Investigators fell “squarely on the ‘production’ side of the line.” In any event, the Ninth  
 28 Circuit rejected the use of the administration/production dichotomy as a determinative test in *Bothell v. Phase  
 Metrics, Inc.*, 299 F.3d 1120 (9th Cir. 2002). See also *Webster v. Public School Employees of Washington*, 247 F.3d  
 910 (9th Cir. 2001) (“the purpose of the dichotomy is to clarify the meaning of ‘work directly related to the  
 management policies or general business operations,’ not to frustrate the purpose and spirit of the entire  
 exemption.”).



1 independent judgment with respect to security issues, they can qualify for the administrative  
 2 exemption. To determine these issues here would require an individualized inquiry as to each  
 3 ISR. In *White v. All American Cable & Radio*, 656 F.Supp 1168 (D.P.R. 1987), the court held  
 4 that a manager for security and safety was an exempt administrative employee. Among other  
 5 duties, the employee organized and conducted security training sessions, oversaw the company's  
 6 security procedures and programs, and advised and made recommendations to his employer on  
 7 security matters. The employee was not directly involved in the formulation of management  
 8 policies, but the court found that the administrative exemption was not limited "to persons who  
 9 directly participate in the formation of management policies or the business operations," but also  
 10 covered "persons who serve in an advisory capacity to management ..." *Id.* at 1170. The court  
 11 held that although "many of plaintiff's responsibilities required him to be outside the office,  
 12 making security inspections or performing other field work, his job was clearly non-manual in  
 13 nature." *Id.* The court also concluded that the employee's functions

14 were of substantial importance to the management and operation of defendant's  
 15 business. In defendant's business of communications, the assurance of property,  
 employee and labor security and safety is of clear import.

16 *Id.* at 1170-71. The court further found that the employee exercised discretion and independent  
 17 judgment when he provided advice and recommendations on security matters and in organizing  
 18 training sessions.

19 In *Copas v. East Bay Municipal Utility Dist.*, 61 F. Supp. 2d 1017 (N.D. Cal. 1999), the  
 20 plaintiff's duties included investigating accidents, implementing measures to prevent the  
 21 recurrence of accidents, participating in the presentation of safety training programs and  
 22 monitoring developments relating to safety programs and regulations, interacting with outside  
 23 vendors and consultants on health and safety issues, and creating guides for employees. The  
 24 court found that the employee had an administrative job and that his duties required the use of  
 25 discretion and independent judgment:

26 His duties involved more than the mere use of acquired skills in applying  
 27 techniques, procedures and standards. He was responsible for reviewing the  
 health and safety plans of the various EBMUD departments and divisions,  
 28 analyzing those plans for compliance with federal and state laws and regulations,  
 and communicating to the managers any deficiencies he found."

1 *Id.* at 1041.

2 In *Dymond v. United States Postal Service*, 670 F.2d 93 (8th Cir 1982), the employees not  
3 only conducted investigations, but also developed and implemented new programs, trained new  
4 personnel, and maintained security. *Id.* at 93 n.2. In finding the administrative exemption  
5 applied, the court held that the employees exercised independent judgment and discretion even  
6 though they were required to follow procedures in a postal service manual. *Id.* at 95.

7 In *Ferrell v. Gwinnett County Board of Education*, 481 F. Supp. 2d 1338 (N.D. Ga. 2007),  
8 the court held that School Resource Officers (“SROs”), who proactively prevented and responded  
9 to school safety and security problems, fell within the administrative exemption. Each SRO’s  
10 primary function was providing for the safety and security of the students, employees, and  
11 property, and they performed their duties relatively free from supervision. The court concluded  
12 that SROs’ primary duty was office or nonmanual work because the “primary value of Plaintiffs  
13 to the School System was their ability to provide safety and security to the people and [property]  
14 in their clusters, not just their ability to perform conventional law enforcement functions that may  
15 traditionally involve manual work.” *Id.* at 1344. Their work was directly related to management  
16 or general business operations, not production, because “the School System is in the business of  
17 educating students, not providing law enforcement.” *Id.* at 1347. They exercised discretion and  
18 independent judgment because they rendered advice to their schools on safety and security  
19 matters, served as a liaison between the school, local law enforcement agencies, and their  
20 community, initiated and directed investigations, and implemented and formulated the school  
21 system’s safety policies. *Id.* at 1348.

22 These cases confirm that contrary to Rix’s attempt to make sweeping generalizations  
23 about exempt vs non-exempt status, it will be necessary for the Court to specifically inquire into  
24 the duties of each ISR in order to determine that issue. This will include making individualized  
25 determinations about an ISR’s role in conducting security training, preparing or implementing  
26 security procedures and programs, providing advice and recommendations on security matters,  
27 implementing measures to prevent security violations, monitoring developments relating to  
28 security programs and regulations, interacting with government agencies and third parties on



1 security issues, and analyzing whether security procedures were in compliance with federal  
 2 regulations. In assessing all these individualized issues, the Court would also need to assess each  
 3 ISR's exercise discretion of independent judgment in performing their duties, and whether or not  
 4 they were subject to "only general supervision" in performing their assignments and tasks. This  
 5 inquiry would become even more complex with individuals like Rix, whose duties, and level of  
 6 supervision, changed repeatedly over the course of his four years of employment in Palmdale.

7 **C. Rix Fails to Address The Relevant Predominance Factors Under Ninth**  
 8 **Circuit Law**

9 In *Vinole* and *Wells Fargo*, the Ninth Circuit addressed the predominance factors that a  
 10 court should consider in a misclassification class action. The Ninth Circuit held that "a district  
 11 court abuses its discretion in relying on an internal uniform exemption policy to the near  
 12 exclusion of other factors relevant to the predominance inquiry." *Vinole*, 571 F.3d at 946.  
 13 Rather, a court must take "into consideration all factors that militate in favor of, or against, class  
 14 certification." The focus should be "on whether the employer exercised some level of centralized  
 15 control in the form of standardized hierarchy, standardized corporate policies and procedures  
 16 governing employees, uniform training programs, and other factors susceptible to common  
 17 proof." *Id.* The Ninth Circuit stressed that "in cases where exempt status depends upon an  
 18 individualized determination of an employee's work, and where Plaintiffs allege no standard  
 19 policy governing how employees spend their time, common issues of law and fact may not  
 20 predominate." *Id.* at 946-47.

21 Rix does not address these factors. Instead, he relies on state law cases that do not address  
 22 Rule 23, or the relevant factors identified in *Wells Fargo* and *Vinole*. See Mtn 17. But, even  
 23 under the state law standard argued by Rix, cases decided subsequent to *Sav-On Drug Stores v.*  
 24 *Superior Court*, 34 Cal.4th 319 (2004), have denied class certification in misclassification cases  
 25 where, as here, the evidence shows the need for individualized inquiries to determine each  
 26 putative class member's exempt status. See *Arenas v. El Torito Rests., Inc.*, 183 Cal.App.4th 723,  
 27 734-35 (2010); *Keller v. Tuesday Morning, Inc.*, 179 Cal.App.4th 1389, 1399 (2009); *Dunbar v.*  
 28 *Albertson's, Inc.*, 141 Cal.App.4th 1422, 1431-32 (2006); *Walsh v. Ikon Office Solutions, Inc.*, 148

1 Cal.App.4th 1440, 1458 (2007).

2 1. *Rix's Alleged Common Evidence Does Not Eliminate Any Of The*  
 3 *Individual Inquiries.*

4 Rix contends that the policy of classifying ISRs as exempt supports certification. The  
 5 Ninth Circuit has rejected this theory as a primary basis for demonstrating predominance. As  
 6 explained in *Wells Fargo*: "Whether such a policy is in place or not, courts must still ask where  
 7 the individual employees actually spend their time [in a case involving the outside sales  
 8 exemption]." 571 F.3d at 959. Therefore, a "uniform exemption policy says little about the main  
 9 concern in the predominance inquiry: the balance between individual and common issues." *Id.*

10 Rix's motion also asserts that LM's job descriptions constitute "further common proof  
 11 relevant to adjudicating the common questions that predominate the resolution of the class  
 12 action." Mtn 11. However, to determine whether an employee is exempt under California law, a  
 13 court "must conduct an individualized analysis of the way each employee actually spends his or  
 14 her time, and not simply review the employer's job descriptions." *Vinole*, 571 F.3d at 937.  
 15 Further, as discussed above Rix's primary duty theory, as well as Rix's testimony, are attempts to  
 16 disavow the clearly exempt duties set forth in the description, such as developing and  
 17 administering security programs and procedures, establishing procedures for handling, storing  
 18 and keeping records, performing work under general direction, representing LM as a prime  
 19 contact on contracts or projects, and developing solutions to a variety of complex problems.  
 20 Thus, even if the job descriptions constituted common proof of job duties, Rix's own theories  
 21 would necessitate individual inquiries as to each and every ISR to determine if they were  
 22 performing the job description duties, or the duties Rix claims he and others performed. *See Mike*  
 23 *v. Safeco Ins. Co.*, 223 F.R.D. 50, 53-54 (D. Conn. 2004) (denying certification because  
 24 determining whether class members actually performed job description duties is an individualized  
 25 question); *see also Trinh v. JP Morgan Chase & Co.*, 2008 WL 1860161 (S.D. Cal. Apr. 22,  
 26 2008) (denying conditional certification under the FLSA where the question of whether class  
 27 members are exempt "necessarily involves a fact-by-fact inquiry into the circumstances of each

1 employee to see if he or she falls within an . . . exemption”).<sup>12</sup>

2 Rix also claims that “the primary tasks of the security reps are defined by comprehensive  
3 corporate procedures and policies.” Mtn 13. Rix has presented no such policies or procedures  
4 into evidence. Rather, he simply vaguely refers to the NISPOM, and other government manuals,  
5 and then relies on his own self-serving testimony that all ISRs had to adhere to the NISPOM for  
6 guidance on how to handle classified and unclassified documents. Interestingly, when Rix was  
7 initially questioned about the NISPOM at his deposition, he could not recall *anything* in the  
8 NISPOM that he referred to during his employment. Ex. 7C (Rix 61:22-67:2).<sup>13</sup>

9 Further, the NISPOM and other guidelines (which vary from program to program) only  
10 set forth the basic general guidelines, and can be subject to differing interpretations. In fact, one  
11 of LM’s witnesses pointed out several examples of specific guidelines in NISPOM and explained  
12 how the guidelines required the use of judgment to apply them to specific situations. Ex 7A  
13 (Aviles 68:2-70:23). LM’s declarants also state how they interpret and apply the guidelines in the  
14 course of their duties, how they obtain waivers from the guidelines, and how they develop  
15 security programs and procedures implementing not only the government guidelines but also the  
16 project specific requirements. Ex 1 (Albin Decl. ¶ 5); Ex 4 (Riggs Decl. ¶ 6).

17 Significantly, “where government regulations or internal employer policies and  
18 procedures simply *channel* the exercise of discretion and judgment and discretion as opposed to  
19 *eliminating* it entirely or otherwise constraining it to a degree where any discretion is largely  
20 inconsequential,” employees can exercise sufficient discretion and judgment under California law  
21 to qualify as exempt. *Taylor*, 2010 WL 4983586 at \*15 (emphasis in original); *see also Kennedy*  
22 *v. Commonwealth Edison Co.*, 410 F.3d 365, 374-75 (7th Cir. 2005) (“while the plaintiff’s  
23 discretion may be channeled by the regulations that apply to [nuclear power plants], that does not

24 \_\_\_\_\_  
25 <sup>12</sup> Plaintiff also wrongly implies that job descriptions are used by LM to fully describe the ISR job responsibilities.  
26 Although the job descriptions are used as the starting point in the preparation of job requisitions, the manager also  
27 sets forth specific criteria for each ISR position in the hiring process. Ex 7H (Young 107:16-108:13); Ex 7A (Aviles  
28 63:14-65:12).

<sup>13</sup> The vague and argumentative (and identically worded) assertions by three declarants that the NISPOM “is the  
Bible, it governs everything,” are not evidence that all ISRs performed the same duties in the same way. Indeed, the  
duties that Plaintiff’s declarants describe in connection with the NISPOM are duties that other declarants state they  
did not perform or were not their primary tasks. *See generally*, Ex 4 (Riggs Dec); Ex 2 (Barragan Dec).

mean ComEd Employees do not exercise independent judgment.”) Thus, the NISPOM and other procedures, including program specific procedures, raise yet another individualized issue the Court would have to determine; *i.e.*, whether a particular ISR (as Rix claims) was unable to exercise discretion and judgment due to the policies, or (as LM’s declarants state) ISRs had their discretion *channeled* by the NISPOM and other procedures. Whether a particular ISR was actually writing procedures for others to follow is yet another individualized inquiry that would need to be made.

In *Wells Fargo* and *Vinole*, the Ninth Circuit made clear that the mere existence of corporate policies does not support certification in a misclassification case. Corporate policies will not support certification unless they demonstrate a “level of centralized control” such that they “govern[] how employees spend their time,” *Vinole*, 571 F.3d at 946-47, and “reflect the realities of the workplace,” *Wells Fargo*, 571 F.3d at 958-59. Rix’s mere references to the NISPOM, etc., or to DSS training, clearly do not meet this standard.<sup>14</sup>

Significantly, in recent decisions applying *Vinole* and *Wells Fargo*, courts denied class certification or granted decertification where the plaintiff, as here, relied on general references to common policies, job descriptions, and training. In *Weigle v. FedEx*, 2010 WL 1337031\*7-\*8, the court held that the defendant’s common processes and training did not support a finding of predominance because they would “provide no help to the Court in determining the actual work mix performed by the Plaintiffs.” Similarly, in *Whiteway v. FedEx Kinko’s Office & Print Servs., Inc.*, Case No. C 05-2320 SBA (N.D. Cal. Oct. 2, 2009), the court granted the defendant’s motion for decertification of the misclassification claim as the plaintiff had “not pointed to any policy or common practice demonstrating that these employees as a class are required or expected to allocate the majority of their time to non-exempt tasks.” In *Wells Fargo II*, on remand, the district court found that even though there were common job descriptions, uniform training, standardized evaluation standards, and similar compensation plans, these common issues would

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<sup>14</sup> Contrary to Rix’s contention, ISRs do not take mandatory uniform training. The testimony cited by Rix is a general description of the type of training provided by the DSS that ISRs can choose to take, but ISRs are not required to take any DSS or other training. Ex 5 (Stephens Dec ¶ 3; Ex 3 (Nye Dec ¶ 6); Ex 2 (Barragan Dec ¶ 5); Ex 1 (Albin Dec ¶ 3) Ex 4 (Riggs Dec ¶ 5).

1 not eliminate the need for the court to conduct fact-intensive inquiries into how each class  
 2 member spent their working day. The court found that these individual inquiries “would  
 3 inevitably consume the majority of a trial, and overwhelm the adjudication of common issues.”  
 4 2010 WL 174329, \*7 (N.D. Cal. Jan. 13, 2010).

5 2. *Rix’s Certification Authority Is Either No Longer Good Law Or Readily*  
 6 *Distinguishable.*

7 Consistent with Rix’s failure address the requirements of *Wells Fargo* and *Vinole*, the  
 8 Motion mainly cites cases that predate those decisions. Mtn 1 n. 2, 19. Indeed, three of the cases  
 9 subsequently rejected class certification, based on the standards set forth in *Vinole* and *Wells*  
 10 *Fargo*.<sup>15</sup> All of the pre-*Vinole* and *Wells Fargo* decisions that Rix cites placed near-exclusive  
 11 reliance on the employer’s common classification of a position as exempt, which the Ninth  
 12 Circuit subsequently ruled was an abuse of discretion.<sup>16</sup> Other cases are clearly distinguishable.  
 13 In *Tierno v. Rite Aid Corp.*, 2006 WL 2535056 (N.D. Cal. Aug. 31, 2006), every store manager  
 14 class member was required to comply with a checklist prepared by the company that set forth a  
 15 list of items that needed to be completed every day and the employer conceded that a single set of  
 16 sixteen specified tasks was applicable to all store managers. In *Brady v. Deloitte and Touche*  
 17 *LLP*, 2010 WL 1200045 (N.D. Cal. March 23, 2010), the plaintiffs pointed to specific statutes and  
 18 company policies regulating unlicensed accountants – including national training to ensure they  
 19 all performed audits the same way – that they alleged restricted the discretion of class members  
 20 and caused them to not work under only general supervision. There is no evidence here of such  
 21 statutory restrictions, global training or common duties uniformly performed by all putative class  
 22 members.<sup>17</sup>

23 <sup>15</sup> See *Wong v. HSBC Mortgage*, 2010 WL 3833952 (N.D. Cal. Sept. 29, 2010); *Wong v. HSBC Mortgage*, 2010 WL  
 24 3833952 (N.D. Cal. Sept. 29, 2010); *Weigle v. Fed Ex*, 2010 WL 1337031 (S.D. Cal. Apr. 5, 2010); *Whiteway v.*  
 25 *FedEx Kinko’s Office & Print Servs., Inc.*, Case No. C05-2320 SBA (N.D. Cal. Oct. 2, 2009).

26 <sup>16</sup> See *Heffelfinger v. EDS Corp.*, 2008 WL 892989 (C.D. Cal. Jan. 7, 2008); *Alba v. Papa John’s USA, Inc.*, 2007  
 27 WL 953849 (C.D. Cal. 2007); *Wang v. Chinese Daily News*, 231 F.R.D. 602 (C.D. Cal. 2005), *aff’d* on other  
 28 grounds, \_\_\_ F.3d \_\_\_ (9th Cir. 2010).

<sup>17</sup> Other cases cited by Plaintiff involved the lenient “first stage” certification standard under the FLSA, not Rule 23  
 (e.g., *Lewis v. Wells Fargo & Co.*, 669 F.Supp.2d 1124 (N.D. Cal. 2009) (“the requisite showing of similarity of  
 claims under the FLSA is considerably less stringent than the requisite showing under Rule 23”), were decided in an  
 uncontested motion for approval of a settlement where it was stipulated that the class had the same work duties and  
 experiences, see *Louie v. Kaiser Foundation Health Plan, Inc.*, 2008 WL 4473183 (S.D. Cal. October 6, 2008), or did  
 not even involve misclassification claims, see *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625 (S.D. Cal. 2010);

**D. Individual Issues Predominate As To Rix's Meal and Rest Break Claims**

Rix submits no evidence to substantiate his burden that the meal and rest break claims should be certified. Certification of those claims should be denied on that basis alone. Rix cannot avoid his evidentiary burden claim by wrongly asserting that "derivative claims" are routinely certified with misclassification claims. Mtn 1 fn 3. The cases Rix cites do not support his assertion. *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625 (S.D. Cal. 2010) and *Ortega v. J.B. Hunt Transp., Inc.*, 258 F.R.D 361 (C.D. Cal. 2009), had no misclassification claims, and *Brady v. DeLoitte & Touche* did not have meal and rest break claims. The decision in *Campbell v. Pricewaterhousecooper*, 253 F.R.D. 586 (E.D. Cal. 2008), to disregard the evidence that these claims present individualized issues is erroneous and should not be followed.

Rix's meal and rest break claims are not entirely derivative of his misclassification claim. Even if Rix or other ISRs were found to be non-exempt, liability would depend on whether ISRs were was "provided" a meal break or "authorized and permitted" to take a rest break – an individualized inquiry as to each employee and each break. See *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529, 534 (S.D. Cal. 2008) ("plaintiffs must show defendants forced plaintiffs to forego missed meal periods") (emphasis in original). Under this standard, courts have held that meal and rest period claims are usually not appropriate for class treatment because individual inquiries predominate. See, e.g. *Blackwell v. SkyWest Airlines, Inc.*, 245 F.R.D. 453, 467 (S.D. Cal. 2007); *Brown v. Federal Express Corp.*, 2008 WL 906517 (C.D. Cal. 2008); *Hernandez v. Chipotle Mexican Grill, Inc.*, 189 Cal. App. 4th 751 (2010). Here, not only has Rix failed to present any common proof that meal or rest breaks were not provided, the evidence shows that they were provided. Ex 4 (Riggs Dec ¶ 13); Ex 2 (Barragan Dec ¶ 9); Ex 5 (Stephens Dec ¶ 9); Ex 3 (Nye Dec ¶ 7).

**VI. RIX FAILS TO ESTABLISH THAT A CLASS ACTION IS THE SUPERIOR METHOD FOR ADJUDICATING THE CLAIMS**

Pursuant to Rule 23(b)(3), Rix must also establish that a class action is superior to other methods of adjudication. Rule 23(b)(3)(D) requires a court to consider "the likely difficulties in

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*Ortega v. J.B. Hunt Transp., Inc.*, 258 F.R.D. 361 (C.D. Cal. 2009); *Perez v. Safety Kleen Systems, Inc.*, 253 F.R.D. 508 (N.D. Cal. 2008); *Kurihara v. Best Buy*, 2007 WL 2501698 (N.D. Cal. August 30, 2007).



1 managing a class action” when deciding whether class certification is proper. “If each class  
 2 member has to litigate numerous and substantial separate issues to establish his or her right to  
 3 recover individually, a class action is not ‘superior.’” *Zinser*, 253 F.3d at 1192. In *Weigele*, the  
 4 court agreed that “given all of the individual issues that must be litigated in this matter, trial  
 5 administration would be overwhelming.” *Weigele*, 2010 WL 1337031 \*10. The same is true  
 6 here.

7 The party seeking class certification bears the burden of demonstrating “a suitable and  
 8 realistic plan for trial of the class claims.” *Zinser*, 253 F.3d at 1198. In *Wells Fargo*, the Ninth  
 9 Circuit rejected the notion that “innovative procedural tools” could render a misclassification trial  
 10 manageable “in light of our determination that Plaintiffs’ claims require a fact-intensive,  
 11 individual analysis of each employee’s exempt status.” 571 F.3d at 947. *See also Mendoza v.*  
 12 *Home Depot, U.S.A. Inc.*, 2010 WL 424679 \*10 (C.D. Cal. Jan. 21, 2010) (finding class action  
 13 not superior “particularly in light of the fact that Home Depot should be entitled to raise  
 14 affirmative defenses to individual plaintiffs’ claims”).

15 A class action is not superior if it is unlikely a jury will be able to reasonably and  
 16 rationally rule on all the issues. *See Weigele*, 2010 WL 1337031 \*11 (“Moreover, the Court is  
 17 unclear how a jury will be able to sort out the issues placed before it. It appears that they will  
 18 need to determine whether each testifying witness was or was not exempt and determine to what  
 19 extent that witness was not provided with mandated overtime, meal, and rest breaks. They will  
 20 then need to extrapolate from all of the testifying witnesses to the entire class. But it is unclear  
 21 which tools they will have to perform that extrapolation. At worst it appears that they would be  
 22 left to guess. This is too amorphous to expect a reasonable and rational result from any jury.”).

23 Here, Rix does not demonstrate “a suitable and realistic plan for trial of the class claims”  
 24 through any type of common proof. Because resolution of Rix’s claims would require substantial  
 25 individualized fact-finding, any trial would be consumed by inquiries into each ISR’s specific  
 26 duties, making a class trial no better than a series of individual actions.

1 **VII. CONCLUSION**

2 For the foregoing reasons, LM respectfully requests that the Court deny Rix's Motion for  
3 Class Certification.

4 Dated: December 20, 2010

MORGAN, LEWIS & BOCKIUS LLP

6 By \_\_\_\_\_  
7 John S. Battenfeld  
8 Attorneys for Defendant  
9 LOCKHEED MARTIN CORPORATION  
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**PROOF OF SERVICE**

*Thomas Rix v. Lockheed Martin Corporation*  
*USDC Case No. 3:09-cv-2063 MMA-NLS*

I am a resident of the State of California, County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is 300 South Grand Avenue, 22nd Floor, Los Angeles, California 90071.

On December 20, 2010, I served on the interested parties in this action the within document(s) entitled:

**DEFENDANT LOCKHEED MARTIN CORPORATION'S ANSWER  
 TO FIRST AMENDED COMPLAINT**

☐ **BY FAX:** by transmitting via electronic facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.; I also caused the fax machine to print such record(s) of the transmission.

☒ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT MAIL:** By **FEDERAL EXPRESS**, following ordinary business practices for collection and processing of correspondence with said overnight mail service, and said envelope(s) will be deposited with said overnight mail service on said date in the ordinary course of business.

☐ **BY PERSONAL SERVICE:** I delivered to an authorized courier or driver authorized by \_\_\_\_\_ to receive documents to be delivered on the same date. A proof of service signed by the authorized courier will be filed with the court upon request.

☐ **BY ELECTRONIC SERVICE:** the parties listed below were served electronically with the document(s) listed above by e-mailed PDF files on December 20, 2010. The transmission was reported as complete and without error. My electronic notification address is 300 South Grand Avenue, 22nd Floor, Los Angeles, CA, 90071. **My e-mail address is cfrutos@morganlewis.com.**

☒ **BY E-FILE:** I caused such documents to be transmitted by e-file with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

**Norman B. Blumenthal**  
**Aparajit Bhowmik**  
 Blumenthal, Nordrehaug & Bhowmik  
 2255 Calle Clara  
 La Jolla , CA 92037  
 Tel: 858-551-1223  
 Fax: 858-551-1232  
 Email: [norm@bamlawlj.com](mailto:norm@bamlawlj.com)  
 Email: [aj@bamlawlj.com](mailto:aj@bamlawlj.com)

*Attorneys for Plaintiff*

**Served by E-File**

**Walter Haines**  
 United Employees Law Group  
 65 Pine Ave, #312  
 Long Beach, CA 90802  
 Tel: 562-256-1047  
 Fax: 562-256-1006  
 Email: [admin@uelglaw.com](mailto:admin@uelglaw.com)

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☐ **STATE:** I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.

Executed on December 20, 2010, at Los Angeles, California.

\_\_\_\_\_  
 CARIDAD F. FRUTOS